Supreme Court, U.S.
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No. 00-323

In The

Supreme Court of the United States

CITY OF McALESTER, et al.,

Petitioners,

v.

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners

City of McAlester and the McAlester Public Works Authority. The McAlester Public Works Authority is a public trust, of which the City of McAlester is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "City of McAlester," and "McAlester" are intended to encompass both Petitioners.

Respondents

Pittsburg County Rural Water District No. 7, referenced herein as "Pitt-7", is an agency and legally constituted authority of the state of Oklahoma (82 Oklahoma Statutes §1324.6), created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 Oklahoma Statutes §1324.3).

At the district court level, this action involved a number of "additional defendants," which were identified as co-appellees at the court of appeals level. The additional respondents to this proceeding are: Kenneth W. Sherrill, Linda F. Sherrill, Bar-19, Blessing Corp., d/b/a Edison Plastics, MIG, Inc., Southwest Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Farms, Inc., Dennis DeFrange, Terry Kinyon, Pittsburg County Regional Exposition Authority, the Board of County Commissioners of the County of Pittsburg, H.G. Gilliam, Chairman Bill Webber, Oben Weeks, and Thundercreek Golf Course Trust Authority. In addition, the Oklahoma Municipal League and the National League of Cities were permitted to participate at the court of appeals level as amicus curiae.

TABLE OF CONTENTS

Page

PARTIES TO THE PROCEEDING i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RESPONSE TO PETITIONERS' STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

RESPONSE TO STATEMENT OF THE CASE 1

ARGUMENT FOR DENYING WRIT 3

I. THE TENTH CIRCUIT'S INTERPRETATION OF §1926(b) IS CONSISTENT WITH FEDERAL LAW 4

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1 (1975) 11

Black Crystal Coal Corp. v. Garland Coal & Mining Company, 267 F.2d 569 (10th Cir. 1959) 1, 5

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987) 8

Glenpool Utility Services v. Creek County Rural Water District, 861 F.2d 1211 (10th Cir. 1988) 8

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989) 7, 10

Midstate Horticultural Co. v. Pennsylvania R.R.., 320 U.S. 356, 64 S.Ct. 128, 88 L.Ed. 96 (1943) 10

Moore Bayou Water Association v. Jonestown, 628 F.Supp. 1367 (M.D. Miss. 1986) 8

North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir. 1996) 5, 6

Sequoyah County Rural Water District No. 7 v. Muldrow, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1532, 120 S.Ct. 1548 (2000) 3

Walters v. City of St. Louis, Mo., 347 U.S. 231 (1954) ...1, 5

Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399 (1976) ...1, 5

STATUTES AND CONSTITUTIONAL PROVISIONS

7 U.S.C. §1926(b) ..... *passim*

82 O.S. §1324.3 i

82 O.S. §1324.6 i

Act I §8, cl. 1 1

RESPONSE TO PETITIONERS' STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

McAlester erroneously lists the U.S. Constitution, Act I §8, cl. 1, (The Spending Clause), as being a constitutional provision involved in this case. McAlester seeks to raise this constitutional argument for the first time within its Petition For Certiorari. However, by failing to raise this issue with the Trial Court and the Tenth Circuit on Appeal, McAlester has waived this constitutional argument. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

RESPONSE TO STATEMENT OF THE CASE

Pitt-7 is an Oklahoma Rural Water District which is now, and has been at various times in the past, indebted to the Federal Government for loans obtained to develop its water distribution system. Pitt-7 brought this action seeking to enjoin McAlester from selling water within its service area, and to recover damages for past water sales in violation of Title 7 U.S.C. §1926(b).

Title 7 U.S.C. §1926(b) [hereafter §1926(b)], states that water service provided or made available through an indebted water district may not be curtailed or limited by a municipality or other public body. As interpreted by the Courts, this provision prohibits a municipality or other public body from selling water within the water district's service area during the period of its indebtedness.

This action began in 1997 when Pitt-7 filed its complaint seeking to enjoin McAlester from selling water to various customers (not limited to the Industrial Park) within the "service area" of Pitt-7 and seeking damages for past sales.

Pitt-7 claims an exclusive right to sell to all water customers within its service area pursuant to Title 7 U.S.C. §1926(b).

The Industrial Park and the other customers in dispute were included within Pitt-7's geographical boundaries as established by state law in 1966. Although Pitt-7 has never sold water to the Industrial Park, it has made water service available, and the only reason such sales have not occurred is because no request for water service has been made to Pitt-7.

The question of whether §1926(b) is an exception to the Federal Antitrust Statute or is somehow a violation of The Spending Clause has never been previously raised, or briefed by McAlester. Section 1926(b) prohibits the limitation or curtailment of customer service that is provided or made available by the indebted water district. This restriction is not limited to curtailment or limitation which is accomplished through inclusion of the area served within the boundaries of a municipal corporation or the public body or the grant of any franchise for similar service, but includes curtailment or limitation of any form during the loan period.

On November 26, 1997, the District Court granted summary judgment based on a finding that Pitt-7 had not made service available to the customers in dispute, a

decision which was in error and has been reversed by the Tenth Circuit.

Sequoyah County Rural Water District No. 7 v. Muldrow, 191 F.3d 1192 (10th Cir. 1999), *cert. denied*, 120 S.Ct. 1532, 120 S.Ct. 1548 (2000), is not an announcement of a new liberal interpretation standard for § 1926(b), but is consistent with all courts which have addressed the issue and held that the protection of §1926(b) must be liberally and broadly applied.

The principal error identified by the Tenth Circuit in the District Court's ruling is not that the Court failed to resolve all doubt (all evidentiary uncertainties) in favor of Pitt-7, but that the District Court applied the test to the wrong time, i.e., the District Court applied the test as of *today*, not when the customer first requested or should have requested water service which is the appropriate time to address the issue of whether service is made available.

ARGUMENT FOR DENYING WRIT

The Court should deny McAlester's Petition For Certiorari because McAlester has failed to properly raise any issues of significant importance.

The Tenth Circuit's ruling that §1926(b) must be liberally construed and applied is consistent with every District Court and Circuit Court which have addressed application of the statute.

McAlester's argument is that because McAlester started selling water to the customers in dispute *before*

Pitt-7 brought its claim to stop McAlester, then McAlester should be allowed to continue to violate Pitt-7's §1926(b) rights. This agreement is frivolous.

McAlester's argument that if §1926(b) actually precludes a municipality from selling water to customers within the indebted association's service area, somehow industrial development is derailed or disputed, is without any supported fact. It is ridiculous to contend that a customer, especially an industrial water customer, cares who provides its water, so long as it has an adequate and reliable water supply.

I. THE TENTH CIRCUIT'S INTERPRETATION OF §1926(b) IS CONSISTENT WITH FEDERAL LAW[1]

The Tenth Circuit's determination that doubts about whether a water association is entitled to protection from competition under §1926(b) should be resolved in favor of the Federally indebted party seeking protection for its territory is an appropriate standard. Appellees seek to have this Court review the Tenth Circuit's decision based upon the *new* argument that §1926(b) is an exception to the Federal Antitrust Laws and therefore must be construed narrowly, an argument which McAlester did not make to the Trial Court or the Tenth Circuit on appeal. Because McAlester failed to raise this argument in a

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[1] Although Pitt-7 has set forth its argument in four separate headings, the issue is the same, i.e., whether the Tenth Circuit has issued an opinion which is inconsistent with federal law. However, as discussed below, the Tenth Circuit's decision is consistent with federal law and the decisions of the other Circuit Courts of Appeals.

timely fashion and has thus waived this issue,[2] the Supreme Court should deny the Petition For Certiorari.[3]

The Tenth Circuit's holding that §1926(b) is to be broadly and liberally construed to fulfill its intended purposes is not a new revelation, but is consistent with every Court which has addressed this issue. The Courts have universally held that the purposes of §1926(b) are "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user costs, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 915 (5th Cir. 1996).

Section 1926(b) furthers its purposes by protecting the territory served by such associations against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [§1926(b)] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal

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[2] *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 745 S.Ct. 505 (1954); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399 (1976); *Black Crystal Coal Corp. v. Garland Coal & Mining Company*, 267 F.2d 569 (10th Cir. 1959).

[3] McAlester contends §1926(b) is an exception to the Federal Antitrust Statutes, without providing any facts or arguments to show that the Federal Antitrust Statutes would otherwise be applicable to Pitt-7, a state agency.

> and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

> "The service area of a federally indebted water association is ***sacrosanct***. Every Federal Court to have interpreted §1926(b) has concluded that the statute should be liberally interpreted to protect FmHA – indebted rural water association from municipal encroachment." (Emphasis added)

North Alamo Water Supply v. City of San Juan, Texas, 90 F.3d 910, 915 (5th Cir. 1996).

The Courts, which have addressed §1926(b), make it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The legislative history of 7 U.S.C. §1926(b) provides additional guidance on the scope of the statutory prohibition. Referring to 1961 revisions in the federal water loan program, the Senate Report explained:
>
> > This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision [section 1926(b)] has

> been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system. S.Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin. News 2243, 2309
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> [2,3] The clear message of the three federal cases applying 7 U.S.C. §1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 424-425 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

A municipality is simply not allowed to encroach upon the services provided by a Rural Water District ***by any means***, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us

> do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of §1926(b).

City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057 (5th Cir. 1987); see also *Glenpool Utility Services v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1214 (10th Cir. 1988); and *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D. Miss. 1986).

In addition, §1926(b) is a statute which was enacted to protect a *"public interest,"* and statutes enacted for such purpose are to be interpreted broadly:

> The doctrine of equitable estoppel, like other principles of equity, will be applied flexibly by a federal court to achieve fairness and avoid injustice. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 104 S.Ct. 2218, 2223, 91 L.Ed.2d 42, 51 (1984). *However, equitable estoppel cannot apply to block the application of a statute enacted to protect the public interest. Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 257, 66 S.Ct. 101, 105, 90 L.Ed. 47, 52 (1945).
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> * * *
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> *The Court finds that the purposes of 7 U.S.C. §1926(b) are to encourage rural water development and to safeguard the interest of the United States in having its loans repaid both purposes aimed at promoting the public interest – rather than merely to protect the private interest of a rural water association.* See *City of Madison, Miss. v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987); S.Rep. No. 566, 87th Cong., lst Sess. reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309. If Jennings were estopped

from invoking the statute in this action, the result would be that North Vernon would sell water to CSL – a result that would totally violate the statutory proscription of municipal encroachment on a rural water association's service. Thus, even if CSL's allegations about Jennings' conduct are true, because as a matter of law estoppel cannot be invoked to subvert the application of a statute enacted in the public interest, CSL's motion for summary judgment must be denied.

This analysis is consistent with cases holding that a private party may not waive the operation of a statute enacted to benefit the public interest. *See Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740, 101 S.Ct. 1437, 1445, 67 L.Ed.2d 641, 653 (1981); *Brooklyn Savings Bank v. O'Neil*, 325 U.S. 697, 704, 65 S.Ct. 895, 900-01, 89 L.Ed. 1296, 1307 (1945) (*"a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy "*); *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 360-61, 64 S.Ct. 128, 130-131, 88 L.Ed. 96, 101 (1943); *Millmaster Int'l, Inc. v. United States*, 427 F.2d 811, 814 (C.C.P.A.) ("A party may not waive a right granted to further a legislative policy in the public interest as manifested in the statute or its legislative history if the waiver would thwart the statutory purpose"), modified, 429 F.2d 985 (C.C.P.A. 1970). As noted above, 7 U.S.C. §1926(b) was enacted to benefit the public interest. Therefore, *just as Jennings could not have voluntarily waived the polication of the statute and authorized North Vernon to violate an act of Congress*, the same result cannot be achieved by estoppel. (Emphasis added)

Jennings Water, Inc. v. City of North Vernon, Indiana, 682 F. Supp. 421 (S.D. Ind. 1988), *aff'd;* 895 F.2d 311 (7th Cir. 1989).

In *Midstate Horticultural*, the court was addressing whether a party, by agreement, could waive a three year statute of limitation period provided by the Interstate Commerce Act. The parties, before the statute of limitation had run, entered into a formal written agreement that the Defendant would not raise the defense of statute of limitations should the parties fail to settle their disputes and litigation be subsequently brought. After the running of the statute of limitations, the Plaintiff brought suit and the Defendant asserted the statute of limitation notwithstanding their prior agreement. The Court in that case held that the agreement not to raise the statute of limitations was *"invalid as being contrary to the intent and effect of the section and the Act"*. *Midstate Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356, 64 S.Ct. 128, at p. 130, 88 L.Ed. 96 (1943).

In this case (as reflected by the *Jennings* decision) the rights provided by Title 7 U.S.C. §1926(b) are rights granted to Pitt-7 in the public interest and to effectuate a legislative policy to ensure repayment to the FmHA and to ensure rural water customers safe, clean water, and the statute should be read broadly to protect these interests.

Antitrust Legislation is given broad interpretation (and exceptions narrow interpretation) because Antitrust Legislation is *"remedial"*:

> "Because the Act is remedial, it is to be construed broadly to effectuate its purposes".

Abbott Laboratories v. Portland Retail Druggists Association, 425 U.S. 1, 12, 96 S.Ct. 1305 (1975).

Section 1926(b), as a "public interest" statute, is likewise *remedial* legislation, which seeks to protect the rural water districts, the customers of the districts, and Federal Government loans, as well as promoting public health and welfare by assuring an adequate, clean water supply for rural residents. Section 1926(b) itself must be construed broadly to effectuate its intended purposes.

CONCLUSION

Based upon the arguments and authorities presented, the Petition should be denied.

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